CHONG TAI LOE

v.

KAREN WONG WAI HAN

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-350-02]
15 JANUARY 2004
(5 APRIL 2004)
[2004] CLJ (JT2)

FAMILY LAW: *Family matters - Intentional interference with familial relations - Husband having adulterous relationship with paramour - Wife suing paramour on tort of negligence - Whether paramour's conduct in having adulterous relationship amounts to tort of negligence - Whether wife can claim damages against paramour under s. 58 Law Reform (Marriage & Divorce) Act 1976 - Whether wife must petition for divorce and cite paramour as co-respondent - Whether law unsatisfactory - Whether Parliament must step in - Whether common law torts of adultery, enticement and harbouring a spouse relevant*

TORT: *Negligence - Committing adultery with another person's spouse - Whether amounts to tort of negligence - Element of 'carelessness' in negligence - Adultery as an 'intentional' act - Whether wife can sue husband's paramour for damages for negligence*

TORT: *Enticement - Applicability - Whether wife can sue husband's paramour on common law tort of enticement - Civil Law Act 1956, s. 3(1)(a)*

TORT: *Harbouring a spouse - Applicability - Whether wife has right to sue husband's paramour on common law tort of harbouring a spouse - Civil Law Act 1956, s. 3(1)(a)*

TORT: *Criminal conversation/Adultery - Applicability - Whether wife has right to sue husband's paramour on tort of adultery - Whether tort of adultery still part of common law of England - Whether applicable in West Malaysia pursuant to s. 3(1)(a) Civil Law Act 1956*

This was an appeal by the defendant from the decision of the senior assistant registrar dismissing her application to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(a) Rules of the High Court 1980 ('RHC').

The plaintiff, a housewife with two children and whose husband is a lawyer, had earlier brought an action in negligence against the defendant. By her statement of claim, the plaintiff alleged that the defendant, a typist in her husband's law firm, has been having an adulterous relationship with her husband. It was alleged that the adultery has caused her husband to neglect her and their children in terms of love and affection and financial support, and that as a result the plaintiff and the children have suffered emotional and physical pain and suffering as well as financial loss. Contending that the defendant has committed a tort (negligence), the plaintiff claimed special and general damages against her.

Held (allowing the appeal):

[1] The plaintiff had no cause of action in negligence against the defendant. There is no authority for the proposition that a person's act of committing adultery with another person's spouse amounts to the tort of negligence, *ie*, that the defendant's conduct in having an adulterous relationship with the plaintiff's husband amounted to the tort of negligence. If at all, the defendant's wrongful conduct was one that was 'deliberate' rather than one that was 'negligent' or 'careless'. The court could not stretch the principles of the tort of negligence to cover the defendant's intentional and wilful act and treat it as negligence. The essence of the tort of negligence is in carelessness. (pp 386 g-h & 387 a-f)

[2] Intentional interferences with familial relations fall beyond the tether of the tort of negligence. The English common law has, however, developed various torts to deal with actionable intentional interferences with familial relations, such as the tort of criminal conversation (tort of adultery), the tort of enticement and the tort of harbouring a spouse. (pp 387 g & 388 a)

[2a] Nevertheless, the common law tort of criminal conversation (tort of adultery) was abolished by the Matrimonial Causes Act 1857 [Eng] whilst the statutory right of a husband to claim damages against a person who commits adultery with his wife was abolished by the Law Reform (Miscellaneous Provisions) Act 1970 [Eng]. In any case, only a husband, and not a wife, could have sued on the tort of adultery. Consequently, the tort of adultery is not a part of the common law of England that is to be applied in West Malaysia – regard being had to s. 3(1)(a) of the Civil Law Act 1956. (pp 388 h, 389 a & 390 b-c)

[2b] By virtue of s. 3(1)(a) of the Civil Law Act 1956, both the tort of enticement and the tort of harbouring a spouse are applicable in West Malaysia. However, at common law, only a husband can sue his wife's paramour under the tort of harbouring a spouse; the wife has no corresponding right to sue. Further, the tort of enticement was also not cited as an alternative cause of action by the plaintiff in the instant case. (pp 389 h & 390 a, d-e)

[3] The plaintiff's only course of action would be to present a petition for divorce against her husband and cite the defendant as a co-respondent and claim damages against her for committing adultery with her husband under s. 58 of the Law Reform (Marriage & Divorce) Act 1976. This, however, reflects a highly unsatisfactory state of the law in the country with regard to intentional interference with familial relations. Why should the plaintiff be compelled to divorce her husband when all she ever intended was to seek relief or redress against the defendant/paramour. Parliament must step in. (pp 390 e-h & 391 a)

[Plaintiff's statement of claim struck out; action dismissed.]

Case(s) referred to:
Best v. Samuel Fox & Co [1952] 2 All ER 394 ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Gray v. Gee [1923] 39 TLR ***(refd)***
Lynch v. Knight [1861] 9 HLC 577 ***(refd)***
Newton v. Hardy [1933] 49 Times LR 522 ***(refd)***
Place v. Searle [1932] All ER Rep 84 ***(refd)***
W v. Essex County Council [2000] 1 FLR 657 ***(dist)***
Winchester v. Flemming [1958] 2 QB 159 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)(a)
Law Reform (Marriage and Divorce) Act 1976, s. 58
Rules of the High Court 1980, O. 18 r. 19

Law Reform (Miscellaneous Provisions) Act 1970 [Eng]
Matrimonial Causes Act 1857 [Eng], ss. 33, 49

Other source(s) referred to:
Blackstone, *Commentaries*, III, p 139
Clerk and Lindsell on Torts, 18th edn, pp 19, 30
Prof H Teff, *Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries, The Cambridge Law Journal*, 57(1), March 1998, pp 91-122
Winfield and Jolowicz on Tort, 15th edn, p 90

For the plaintiff - CY Chew; M/s SY Chew & Co
For the defendant - SS Gabriel; M/s N Saraswathy Devi

Reported by Gan Peng Chiang

JUDGMENT

Mohd Hishamudin Yunus J:

This is an appeal by the defendant from the decision of the learned senior assistant registrar, High Court, Kuala Lumpur. The learned registrar had dismissed the defendant's application to strike out the plaintiff's statement of claim on the ground that it discloses no reasonable cause of action. The defendant's application was pursuant to O. 18 r 19 of the Rules of the High Court 1980.

I have allowed the appeal with costs.

The plaintiff is a housewife with two children. Her husband is a practicing lawyer. According to the statement of claim, the defendant is employed by the plaintiff's husband at his legal firm as a copy typist. It is alleged by the plaintiff that since 1994 the defendant has been having an adulterous relationship with her husband; and that ever since the adulterous relationship the plaintiff's husband has neglected the plaintiff and her children in terms of love and affection as well as financial support. It is alleged that the plaintiff had pleaded with the defendant to leave her husband, but the plea was ignored. As a result of the adulterous relationship, the plaintiff and her children have suffered emotional and physical pain and suffering as well as financial loss. In this action, the plaintiff sues the defendant in negligence. She claims against the defendant for special and general damages. The learned counsel for the plaintiff, in contending that the defendant by reason of the adulterous relationship has committed a tort of negligence, refers to *W v. Essex County Council* [2000] 1 FLR 657 and an article in *The Cambridge Law Journal* entitled *Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries* (57(1), March 1998, pp. 91-122) by Prof. H. Teff

In my judgment, the plaintiff has no cause of action in negligence against the defendant. Hence the statement of claim must be struck out and the suit dismissed.

Assuming the allegation of adulterous relationship and the consequential pain and suffering and financial loss is true, there can be no doubt that there was a wrongdoing on the part of the defendant against the plaintiff; and that the plaintiff and her children are the victims of that wrongdoing. However, I know of no authority (and neither could the counsel for the plaintiff provide me with any; and, with respect, I find *Essex County Council* and *The Cambridge Law*

Journal article that she cites as irrelevant to the issue at hand) that clearly supports the proposition that the conduct of the defendant amounts to the tort of negligence against the plaintiff. Based on the averments in the statement of claim, the defendant knows that the plaintiff's husband is married to the plaintiff and has children. Thus there is an intentional interference with a familial relation by the defendant. As the wrongful conduct of the defendant is in the form of a deliberate act rather than in the form of a negligent or careless act; or to state it in another way, there is a conscious and wilful invasion by the defendant into the plaintiff's marital relation with her husband, a wrongful act committed knowingly, my view is that, however sympathetic this court is to the plight of the plaintiff, it would be an unwarranted overstretching of the principles of negligence to treat such a deliberate act of the defendant as a tort of negligence. The learned Law Lords in the landmark case of *Donoghue v. Stevenson* [1932] AC 562, when formulating the principles of the law of negligence, could never have envisaged applying the principles of the law of negligence to such a deliberate and intentional act. What the learned judges had in mind were careless and negligent acts or omissions, not wilful conduct or deliberate acts.

The "careless" element as being the essence of the tort of negligence is made clear by *Winfield and Jolowicz on Tort*, 15th edn., when the learned authors, in discussing "duty to take care", in the chapter on "*Negligence"*, state (at p. 90):

> It is not for every careless act that a person may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care.

The same point is also stressed by *Clerk and Lindsell on Torts* when it states (at p. 30):

> Negligence liability. The primary importance of negligence, of carelessness, as the relevant fault engaging liability in tort naturally lies in the tort of negligence itself.

The common law (the source of the law of torts) had developed various torts in respect of claims for intentional harm other than trespass to the person; but it had never regarded such wrongdoing as the tort of negligence. The common law has treated actionable intentional interferences with familial relations as intentional torts; and the torts developed by the common law are, depending on the facts of the particular case:

(a) the tort of criminal conversation (or the tort of adultery);

(b) the tort of enticement; and

(c) the tort of harbouring a spouse.

For the above torts, the action against the wrongdoer could only be at the instance of the husband, and historically such action was regarded as an action of trespass for invasion of the proprietary right that, it was considered, the husband had in his wife.

Today in England such torts are considered obsolete. They are hardly mentioned in the standard works on the law of torts. Even *Clerk and Lindsell on Torts* 18th edn. has only this to say (at p. 19):

> Family interests. Interference with family rights was once protected by torts such as seduction and enticement. A man was regarded as having an interest in the practical services of his wife and children and in the sexual services of his wife. Such torts affirming an outdated conception of family relations have now been abolished and are no longer dealt with in this work.

The archaic law relating to criminal conversation states that a man has a right of action for damages against a person who has had sexual relations with his wife: on the footing that, although she was a guilty party, nevertheless her paramour was responsible. Blackstone, the great English jurist, in his *Commentaries* stated (III, p. 139):

> Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater) the law gives a satisfaction to the husband for it by action of trespass vi et armis against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife; founded on her previous behaviour and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious.

The anomaly (and injustice, judging by present day standards of justice) of the principle was that only a husband could sue: a woman could not sue her husband's paramour for adultery with her husband. But, then, the principle was based on the social norms of English society at that time, the servile position of the wife relative to her husband. Indeed, the action was based on the concept then (certainly outmoded and unacceptable today) that the wife was supposedly akin to a chattel of her husband. However, be that as it may, this right of the husband to sue for adultery was abolished in England in 1857 by the (English)

Matrimonial Causes Act 1857. In its place, ss. 33 and 49 of the Act conferred on a husband the right to claim damages against a person who committed adultery with his wife. Proceedings could be taken either in conjunction with a petition for divorce or judicial separation or without presenting such a petition. However, in the last century, in 1970, this right was abolished by the (English) Law Reform (Miscellaneous Provisions) Act 1970.

The other cause of action developed by the English common law for the purpose of giving remedy to a person, a victim of an intentional interference with a familial relation, is the tort of enticement. It is a tort to wrongfully entice one spouse away from another. Adultery is not an ingredient of the tort and, conversely, adulterous conduct *per se* does not give rise to an action for enticement. However, the inducement to leave must be something stronger than mere solicited advice or sexual attraction, but it is not necessary that the will of the plaintiff's spouse should have been overborne by the stronger will of the defendant. Earlier in the development of the principle by the English courts, the right of the husband to sue was clear: however, there was no clear authority as to whether a wife too has a right to sue for enticement. In *Lynch v. Knight* [1861] 9 HLC 577; 11 ER 854, the House of Lords was divided on the issue. However, in 1923, Darling J, in *Gray v. Gee* [1923] 39 TLR held that a wife could sue for enticement. This was followed by Swift J in *Newton v. Hardy* [1933] 49 Times LR 522 (KB Div.). In *Place v. Searle* [1932] All ER Rep. 84, Scrutton LJ, delivering the judgment of the English Court of Appeal, said (at p. 85):

> It seems to me clear, at the present day, that a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that either has a cause of action against a third party who without justification destroys that consortium.

In the House of Lords decision in *Best v. Samuel Fox & Co.* [1952] 2 All ER 394, Lord Goddard, approving *Place v. Searle*, said *(albeit obiter)* (at p. 397):

> A wife is entitled to enjoy the society, comfort and protection of her husband and to be maintained by him, and if another entices him from her so that she is bereft of those benefits she is as much entitled to claim damages as is a husband whose wife is for any reason, save humanity, abducted or persuaded to leave his home.

Next, it is a tort for a person to harbour a man's wife after notice that she has left him without his consent, except where the harbouring is on humanitarian ground. Like the tort of enticement, adultery is not an ingredient of this action. However, like the tort of criminal conversation, there is an anomaly in the law: the law does not recognize the right of a wife to sue a third party for the harbouring of her husband. In the English case of *Winchester v. Flemming* [1958] 2 QB 159 this issue came squarely before the court and Devlin J held that a wife did not have such a right. In the words of the learned judge (at p. 265-266):

> … where the choice lies between leaving a decaying form of action in the shape in which it was originally constructed and adding on up-to-date extensions, the Court may refuse to embark on the task of modernization.

The tort of criminal conversation (or the tort of adultery) by reason (as stated above) of it being abolished in England in 1857, and by reason of s. 3 of the Civil Law Act 1956, is not a principle of English common law applicable to West Malaysia. Section 3 of the Civil Law Act states:

> **3. Application of UK common law, rules of equity and certain statutes.**
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered or in force in England on 7th April, 1956.

However, by reason of the same s. 3(1)(a), the tort of enticement and the tort of harbouring a spouse are today, although very rarely invoked in this country, still applicable in West Malaysia; since, on 7 April 1956, these principles of common law were still administered or in force in England (although, as said above, such torts are today considered obsolete in England).

In the present case, the plaintiff is only suing for negligence. The tort of enticement is not cited as an alternative cause of action. In any case, on the averments in the statement of claim, it is not open to the plaintiff to sue the defendant for the tort of enticement. There is no averment to the effect that the defendant had induced the plaintiff's husband to leave the plaintiff and live with the defendant.

In the present case, based on the facts as disclosed by the statement of claim, the only remedy available to the plaintiff, as contended by the learned counsel for the defendant, is to present a petition for divorce against her husband, cite the defendant as a co-respondent in that petition, and claim damages against her for the adultery. Such a course of action is provided for by s. 58 of the Law Reform (Marriage and Divorce) Act 1976. However, this being the position, the state of the law in this country on matters pertaining to intentional interference with familial relation is, to my mind, highly unsatisfactory. It is, I think, pertinent to ask: why should a person, such as the plaintiff, be compelled to file a divorce petition against his/her spouse if the only relief or remedy that he/she wants is, not to divorce his/her wife/husband, but merely to seek redress against the party who has committed adultery with his/her spouse?

So, time and again an aggrieved spouse turns to the court, not to the Family Court to petition for divorce against her husband, but to the Civil Court hoping to obtain some form of redress against the husband's paramour. But given the present state of the law and the constitutional role of the court as mere interpreter of the law, there is little that the court can do in terms of giving a satisfactory remedy. The problem must be addressed to the appropriate branch of Government: the legislature.